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The INTERNATIONAL LAW SECTION OF THE FLORIDA BAR hereby files its *amicus curiae* response and comments on the Petition to Amend the Rules Regulating the Florida Bar and the Florida Rules of Judicial Administration.

STATEMENT OF POSITION

The International Law Section (ILS) supports the Florida Bar's effort to ensure the continued growth and viability of international arbitration in Florida. The Florida Bar's Petition seeking to amend the Rules Regulating the Florida Bar and the Florida Rules of Administration proposes to exempt non-Florida lawyers participating in international arbitrations from certain requirements and limitations being proposed for domestic arbitrations and *pro hac vice* appearances in court. The exemptions adequately address the concerns of the ILS with regard to the impact of the proposed amendments on the conduct of international arbitrations in Florida.

The "international arbitrations" addressed in the proposed amendments are not an *alternative* method of dispute resolution. The disputes resolved in these proceedings will never be heard in any court. They will always be arbitrated. The only question is where. This Court's decision with regard to the proposed amendments will forever determine whether sophisticated parties to international business transactions choose to

arbitrate their disputes in Florida, or in one of the world's other leading arbitral centers.

BACKGROUND

With the globalization of business and finance, lawyers are now required to meet their clients' legal needs in multiple jurisdictions. American Bar Association Center for Professional Responsibility, *Client Representation in the Twenty-First Century; Report of the Commission on the Multijurisdictional Practice*, at 3-4 [hereinafter ABA MJP Report]. Indeed, "the most significant qualification to render assistance in a legal matter is [no longer] knowledge of any given state's law, but knowledge of federal or international law or familiarity with a particular type of business or . . . transaction or . . . proceeding." *Id.* at 3.

Recognizing this reality, former ABA President Martha Barnett appointed a Commission on Multijurisdictional Practice (MJP) to study this issue. The ABA Commission sought input from the states and eventually issued a series of recommendations, which all the states have now been urged to adopt. As a result, two different MJP commissions have considered the question of multijurisdictional practice in Florida. The amendments proposed by the Florida Bar are the product of the recommendations of what

is commonly referred to as Commission II, and contain specialized provisions and exemptions for international arbitrations.

Commission II conducted special hearings for the express purpose of considering the unique issues implicated by international arbitrations and, in conjunction with the ILS, drafted the specialized provisions and exemptions for international arbitrations. The MJP Commission and the Board of Governors considered a variety of information in coming to this decision. The material submitted included comprehensive presentations by representatives of the ILS, authoritative treatises and precedents, opinion evidence from internationally renowned experts in the field of international arbitration,[1] and evidence from the Office of the Governor regarding the importance of international arbitration on Florida's economic future and the potential impact of the proposed amendments on Florida's bid to secure the Permanent Secretariat of the Free Trade Area of the Americas (FTAA).

[1] Both the MJP Commission and the Board of Governors considered the expert opinions of Horacio A. Grigera Naón, Stephen R. Bond and William A. Wilson, III with regard to the impact of the Bar's proposal on international arbitrations. Their comments are listed as dissents on p. 19 of the Petition. However, these experts' comments were submitted in support of the ILS position, and their recommendations were in fact adopted. As such, the ILS believes that the statements from Messers. Grigera Naón, Bond and Wilson should be more appropriately listed as commentary/collaboration to Proposed New Rule 1-3.11.

The FTAA is intended to be the most far-reaching trade agreement in history. Third Draft FTAA Agreement (Nov. 21, 2003), *available at* http://www.ftaa-alca.org (last visited March 8, 2004). It will unite the economies of the Americas into a single free trade area, comprising 800 million consumers with a combined gross domestic product of $14 trillion. Florida FTAA, *available at* http://www.floridaftaa.org/frontend/ftaa.php (last visited March 8, 2004). The location of the Permanent Secretariat will be "recognized by multinational corporations as the epicenter of global commerce." Mitchell Pellecchia, *Miami Unveils Official Proposal for FTAA Secretariat at Coral Gables Meeting* (March 7, 2004), *available at* http://www.miamisunpost.com (last visited March 8, 2004). It will be the place where the "rules of the game" are set, where cross-border transactions are negotiated, and where an important part of the international legal infrastructure supporting international commerce will be located. *Id*.

SUMMARY OF PROPOSED AMENDMENTS RELATING TO INTERNATIONAL ARBITRATION

The Florida Bar proposes, *inter alia,* that Rule 4-5.5 be amended in order to permit non-Florida lawyers, both U.S. and foreign, to provide temporary legal services in Florida in connection with a pending or potential arbitration, mediation or other alternative dispute resolution proceedings.[2]

[2] This aspect of the Bar's proposal is consistent with the ABA's recommendations. The ABA model contains two separate rules – ABA Model Rule 5.5, and the ABA Model Rule for Temporary Practice by Foreign Lawyers (Recommendation 9). ABA Model Rule 5.5 permits temporary practice by

Nothing in either the ABA recommendations or the Florida proposal will permit non-U.S. lawyers to appear *pro hac vice* in court. With regard to appearances by non-U.S. lawyers in international arbitration proceedings, both the ABA and proposed Florida models adequately protect the public by requiring that the non-U.S. be in good standing and subject to effective discipline in their home jurisdiction.

The Florida Bar is also proposing that New Rule 1-3.11 be adopted. This rule will set forth the guidelines and procedures for non-Florida lawyers appearing in all arbitration proceedings in Florida, both domestic and international. It is substantially similar to Rule 1-3.10, which sets forth the guidelines and procedures for *pro hac vice* appearances in Court. Under the Bar's proposal, lawyers participating in domestic arbitrations and appearing *pro hac vice* in court will, among other things, be required to file a Verified Statement for Leave to Appear (the "notice" requirement) and to pay a non-refundable $250 fee. They will also be limited to three appearances in Florida within a 365-day period.[3]

Under the Bar's proposal, lawyers participating in international arbitration proceedings will be exempted from the notice and fee requirements, as well as from the limitation on the number of appearances within a given year being proposed for domestic arbitrations and *pro hac vice* appearances in court.[4] The proposed exemptions are necessary because

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lawyers admitted in other United States jurisdictions, while Recommendation 9 permits temporary practice by lawyers admitted in non-United States jurisdictions. Florida's proposed amendments to Rule 4-5.5 essentially combines these two ABA rules into one, thereby permitting temporary practice by out-of-state lawyers and a non-U.S. lawyers under one rule.

[3] The Bar's proposal limits the number of appearances by creating a presumption that filing more than 3 appearances within a 365-day period constitutes "general practice." The filing of a demand or response to arbitration is considered an "appearance" under the proposed amendments.

[4] The ILS understands that other interested groups are objecting to various limitations and requirements being proposed for domestic arbitrations and *pro hac vice* appearances in Court. The ILS takes no position on the Bar's proposal with regard to those issues. The ILS position is simply that, *if* a Verified Statement for Leave to Appear and a $250 fee is going to be required, and *if* a limitation on the number of appearances that may be made within a given year is going to be imposed, international arbitrations must be exempted from those provisions.

any unwarranted regulatory restrictions on international arbitrations will be viewed as intrusive by the international community and will cause sophisticated parties to private international agreements to arbitrate their disputes somewhere other than Florida. The exemptions also are needed because the FTAA negotiators will consider any unnecessary restrictions on international arbitrations to be a significant factor disqualifying Florida as a candidate for the Permanent Secretariat and would have lasting repercussions of Florida's viability as an international business and arbitral center. Recognizing these realities, and recognizing that international arbitrations do not pose any unreasonable regulatory risks warranting close monitoring by the Florida Bar, Commission II properly concluded that international arbitrations should be exempted from the notice, fee and "3 strikes" provisions being proposed for domestic arbitrations and *pro hac vice* appearances in Florida courts.[5]

The definition of "international arbitrations" used for the proposed exemptions contained in Proposed New Rule 1-3.11 is taken from the Florida International Arbitration Act (FIAA). FLA. STAT. § 684.03 (2003). It ensures that FTAA arbitrations will qualify for the exemptions. The exemptions apply equally to all non-Florida lawyers, so long as the arbitration proceeding at issue fits within this definition of "international arbitrations." Stated another way, the exemptions apply based on the character of the arbitration, not on the nationality of the non-Florida lawyer. Under the Bar's proposal, a lawyer admitted to practice in a foreign jurisdiction receives no better treatment than a non-Florida, U.S. lawyer.

As more fully set forth in this Response, the proposed exemptions are both necessary and required in the context of international arbitrations.

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[5] It is important to note that, as a practical matter, non-Florida international arbitration practitioners will rarely ever file 3 or more demands or responses to an international arbitration in Florida within a 365-day period. As explained, *infra*, the exemption from this "3 strikes" provision for international arbitrations is necessary not because international practitioners appear in Florida with more frequency, but rather because the imposition of *any* unnecessary restrictions will seriously damage Florida's efforts to attract the Permanent Secretariat of the FTAA and become a center for international arbitrations

OVERVIEW OF INTERNATIONAL ARBITRATION

"International arbitration" is the principal method of dispute resolution for investor-state disputes under NAFTA, bi-lateral investment treaties, and free-trade agreements such as the FTAA. *See e.g.* North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., chapter 11, 32 I.L.M. 297-298 [hereinafter NAFTA]; Treaty Between the Argentine Republic and the United States of America Concerning the Reciprocal Encouragement and Protection of Investment, Nov. 14, 1991, art. VII (3), 1991 U.S.T. 176; Treaty Between the Government of the United States of America and the Government of the State of Bahrain Concerning the Encouragement and Reciprocal Protection of Investments, Sept. 29, 1999, art. 9, 1999 U.S.T. 159 In order to promote international trade and foreign investment, NAFTA, BITs, and other free-trade agreements contain provisions setting forth minimum standards of treatment for foreign investments, and prohibiting various activities by the "host" governments in the country where the investment is made. For example, Chapter 11 of NAFTA requires that all signatory countries accord investors of other signatory countries no less favorable treatment than accorded to its own nationals and nationals of other signatory countries in like circumstances, and also requires that the foreign investor be treated in accordance with international law, including fair and equitable treatment and full protection and security. NAFTA, arts. 1102-1104. It also prohibits, *inter alia*, expropriation of a foreign investment without due process of law and just compensation, as well as the imposition of performance requirements for the investment (except those generally requiring that the investment meet generally applicable health, safety or environmental protections). *Id.* arts. 1106, 1110.

An "investor-state" dispute arises when an investor of a signatory country suffers a loss by reason of a breach of one of these treaties. The treaties permit the investor to bring a legal claim against the host government where the investment is made. *See e.g.* NAFTA art. 1101, 1116. The claim is heard by an international tribunal under rules laid out by either the World Bank, through its International Centre for the Settlement of Investment Disputes ("ICSID"), or by the United Nations Commission on International Trade Law ("UNCITRAL"). NAFTA, art. 1120.

International arbitration is also the primary method of dispute resolution for private, trans-national commercial disputes, particularly in Europe and Latin America and by U.S. entities doing business in those jurisdictions. *See generally* W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION (2000) [hereinafter CRAIG]; JACK J.

COE, INTERNATIONAL COMMERCIAL ARBITRATION: AMERICAN PRINCIPLES AND PRACTICE IN A GLOBAL CONTEXT, 52 (1997) [hereinafter COE]; Committee on Arbitration and Alternative Dispute Resolution, *Recommendation and Report on the Right of Non-New York Lawyers to Represent Parties in International and Interstate Arbitrations Conducted in New York* 47, 49 THE RECORD 1 (1991) [hereinafter NY Committee Report]; Letter from Raquel A. Rodriguez, Office of the Governor General Counsel, to Miles A. McGrane, President of the Florida Bar (July 28, 2003) [hereinafter Rodriguez Letter] (Attached as "Exhibit A"); Letter from Stephen R. Bond, Co-Head of White & Case International Arbitration Practice Group, to John A. Yanchunis, Chairperson of the Special Commission on the Multijurisdictional Practice of Law (Sept. 3, 2003) [hereinafter Bond Letter] (Attached as "Exhibit B"); Letter from Horacio A. Grigera Naón, Special Counsel, White & Case, to John A. Yanchunis, Chairperson of the Special Commission on the Multijurisdictional Practice of Law (Sept. 3, 2003) [hereinafter Grigera Naón Letter] (Attached as "Exhibit C"); Letter from William A. Wilson III, Wilmer, Cutler & Pickering International Transactions Practice Group, to John A. Yanchunis, Chairperson of the Special Committee on the Multijurisdictional Practice of Law (Sept. 4, 2003) [hereinafter Wilson Letter](Attached as "Exhibit D"). These proceedings typically involve disputes regarding multi-million dollar international transactions between sophisticated parties. Rodriguez Letter, *supra,* at 2; Wilson Letter, *supra*, at 1. The parties to these transactions agree in advance that any disputes arising in connection with the underlying contract will be resolved by international arbitration, rather than in national courts. They do so because international arbitration eliminates a variety of unique difficulties associated with litigating international commercial disputes in court. For example, international commercial disputes lend themselves to result-oriented forum shopping, which can be compounded by corruption in national courts. *see* COE, *supra*, at 17-22. Concurrent jurisdiction over the dispute in different courts may result parallel proceedings, with the corresponding risk of inconsistent judgments. *Id.* Moreover, there are frequently differing notions among the competing legal systems regarding fundamental issues such as personal jurisdiction, choice of law, evidentiary standards and scope of discovery. *Id.* And parties to litigation in national courts cannot voluntarily select a neutral decision-maker with particular expertise in the substantive, underlying transaction. *Id.* Finally, there are significant difficulties associated with enforcing a foreign court judgment rendered. *Id.*

International arbitration, on the other hand, allows the parties to determine with certainty the procedural rules and substantive law that will govern their dispute, and to select in advance a neutral and convenient location where it will be resolved. *See* COE, *supra*, at 22-24, 27; ABA MJP Report, *supra*, at 26-27; Rodriguez Letter, *supra*, at 2; Bond Letter, *supra*, at 3; Wilson Letter, *supra*, at 1. Given the increased globalization of business and finance, and the relative difficulties associated with litigating transnational disputes as compared with the benefits of arbitrating them,

> [i]t is not surprising that [international] arbitration . . . has emerged as an important fixture. The global efficacy of a well-drafted arbitration clause greatly reduces the possibility of parallel proceedings. The internationally preclusive effect accorded an arbitral award discourages dissatisfied parties who might otherwise desire to pursue a second chance before a national court. The autonomy of the parties in selecting the arbitral procedure, the substantive law that will govern their contract, and the arbitrators who will determine their claims . . .promotes relative peace of mind. The inherent flexibility of arbitration . . . allows the parties to minimize conflicts in legal culture, or at least to establish a neutral format, free of idiosyncrasies familiar to one party but not to the other.

COE, *supra*, at 27.

INTERNATIONAL ARBITRATION IN FLORIDA

A. History of International Arbitration in Florida

Responding to the globalization of business and finance, and the corresponding growth in international arbitration worldwide, in 1986 the Florida legislature passed the FIAA. The FIAA demonstrates the foresight of the people of Florida in recognizing the benefits of international arbitration for the resolution of disputes involving sophisticated, trans-national commercial transactions, as well as their long-standing commitment to promoting the growth of international arbitration in our State. It also demonstrates that the people of Florida have long been aware that a thriving and viable international arbitration practice is a key component to the success of any regional center for international business and finance. Indeed, the express purpose of the FIAA is to foster Florida's growth as an international arbitral center for disputes involving Latin America and the Caribbean, in order to complement Florida's emergence as a regional center for international commerce. TASK FORCE ON INTERNATIONAL ARBITRATION, REPORT ON THE PROPOSED FLORIDA INTERNATIONAL ARBITRATION ACT, Summary Explanation 2 (Dec. 18, 1985) [hereinafter Task Force on International Arbitration Report].

A Florida Bar Task force was the driving force behind the FIAA, and participated in drafting its provisions. *Id.* at 2. The Legislature sought to achieve the Act's goals by creating "a legal climate hospitably disposed toward [international] arbitration." *Id.* The text of the FIAA was thus drawn from varied sources from around the globe, in order to "place Florida's legal system among the vanguard of the world's legislative systems as concerns international arbitration." *Id.* at 1.

B. Growth of International Arbitration in Florida

Since the passage of the FIAA, Florida has indeed become the commercial hub for Latin America. It has also become the one of the busiest venues in the country for international arbitrations, second only to New York. Telephone interview with Albert Orosa, Vice President, American Arbitration Association (June 18, 2002). Indeed, Florida has become *the* situs of choice for the arbitration of private commercial disputes involving Latin America. Sebastian O'Meara, *Miami: Future Hub for Revived Latin American International Arbitration*, LATIN LAWYER, Feb./Mar. 2003 at 30. Just last year, the Inter-American Bar Association and the America Arbitration Association's International Center for Dispute Resolution signed a co-operation agreement to promote and further develop international arbitration in Florida. Co-Operation Agreement Between the American Arbitration Association and the Inter-American Bar Association. A copy of the Cooperation Agreement is attached as "Exhibit E."

Florida's prominence as the most desirable and logical choice for international arbitrations involving Latin America, as well as the exponential growth in interest in arbitrating here, is demonstrated by the caliber of major conferences now held here on the subject. For example, the *Miami International Arbitration Conference*, co-sponsored for the last two years by the America Arbitration Association's International Center for Dispute Resolution, and the recent International Chamber of Commerce's *International Commercial Arbitration in Latin America* conference, drew hundreds participants from around the world, including *the* foremost authorities on international arbitration. *Miami International Arbitration Conference*, (Jan. 28-30, 2004)(copy of the program and participants are attached as "Exhibit F"); *International Commercial Arbitration in Latin America: The ICC Perspective*, (Oct. 26-28 2003) (copy of the program and participants are attached as "Exhibit G.")

THE BAR RECOGNIZES THAT INTERNATIONAL ARBITRATIONS WARRANT AND REQUIRE EXEMPTION FROM MANY LOCAL BAR REGULATORY REQUIREMENTS

A. The Bar's Proposal Recognizes That International Arbitrations Do Not Warrant Close Regulation by Local Bar Authorities

"In practice, problems over the conduct of [international] arbitrations by foreign lawyers seldom arise." NY Committee Report, *supra*, at 48. Indeed, as the Petition recognizes, the risk of any threat of harm to the public in this context is minimal. Florida Bar, Petition to Amend the Rules Regulating the Florida Bar and the Florida Rules of Judicial Administration, Case Number SC04-135 [hereinafter Petition]. As detailed above, the disputes at issue typically involve complex transactions between sophisticated parties, represented by equally sophisticated lawyers. The site of an international arbitration is selected based on its perceived neutrality and the corresponding detachment from the local law and, consequently, generally bears no relationship to the law governing the underlying dispute. CRAIG, *supra,* at 304; COE, *supra*, at 54-55 (discussing detachment theory); Bond Letter, *supra,* at 2; Rodriguez Letter, *supra,* at 2-3; *see also* ABA MJP Report, *supra,* at 26. Indeed, the site of an international arbitration is frequently chosen "precisely because it has no connection to either party or the dispute." ABA MJP Report, *supra*, at 26-27. The Bar's proposed exemptions for international arbitrations are based on recognition of these undisputed facts. Petition, *supra,* at 27-28.

Because the site of an international arbitration usually has no connection to the underlying dispute, the parties to international arbitration proceedings chose their counsel based on factors such as existing knowledge of the underlying transaction or specialty in a certain field, rather than on familiarity with the local law of the situs. CRAIG, *supra,* at 304; Wilson Letter, *supra,* at 1; *see also* ABA MJP Report, *supra,* at 3. Increasingly, counsel is selected based on their expertise in international arbitration in general, even though they may have little or no connection with the place of the arbitration. *See* CRAIG, *supra,* at 304. And because international arbitration practitioners have extensive experience and specialized expertise, "[i]n each case the decision to retain local counsel is left to the judgment and ethical sense of the lawyer conducting the arbitration." NY Committee Report, *supra,* at 49; *see also* CRAIG, *supra,* at 304, n. 15.

B. The Bar's Proposal Recognizes That No International Arbitral Center Places Any Unnecessary Restrictions on Attorneys Participating in International Arbitrations

"One of the most obvious advantages of international arbitration is the freedom it gives parties to select counsel of their own choice irrespective of where the dispute is heard." CRAIG, *supra,* at 303. Due to the unique attributes of cross-border commercial disputes and the near-universal acceptance of international arbitration as the dispute-resolution mechanism to resolve them, "an international corps of arbitration experts has emerged." *Id.* at 304 n. 15 (quoting J.G. WETTER, SVENSK JURISTTIDNING, 160 (1984)). These specialized practitioners share values and viewpoints within their legal culture, which in turn "promotes the growth of a new, unitary international law of arbitration." *Id*. The Bar's proposed exemptions for international arbitrations are designed to ensure that these practitioners continue to bring their cases to Florida, while at the same time maintaining the appropriate level of public protection warranted in this context. *See* Petition, *supra,* at 28 (noting that concerns regarding international arbitrations were addressed with the exemptions.)[6]

Recognizing that international arbitrations typically do not implicate the same regulatory concerns that exist in other contexts and that unnecessary restrictions are viewed as an intrusion upon the voluntary and consensual nature of international arbitration as a dispute-resolution mechanism, no major international arbitral center places any limitations on attorneys participating in them. *See, e.g.* CRAIG, *supra,* at 304 (stating that "the authors know of no country in Europe, especially among those most frequently chosen as the seats of international arbitration, where it is considered imperative that parties . . . use locally qualified counsel."); Bond Letter, *supra,* at 2 ("I have represented parties in international arbitrations in such places as Brussels, Geneva, London, Stockholm, Vienna and Zurich, and have never encountered any such requirement."); Rodriguez Letter, *supra,* at 2 ("None of these centers require the advocates appearing in the arbitration to be admitted to or register with the local bar."). Indeed, the historical strongholds of international arbitration have a totally "hands off"

[6] The concerns raised by the attorneys from White & Case, that is, Messers. Bond and Grigera Naón, and by Mr. Williams were specific to international arbitrations only. Thus, the Petition is accurate in that it states that the concerns raised with regard to international arbitrations were addressed with the exemptions.

policy, dispensing with even the most basic requirements. "In England and Wales, where the local bar enjoys a near-monopoly of appearance rights before domestic courts, there are no restrictions on appearance before arbitral tribunals." CRAIG, *supra*, at 306. Similarly, "the monopoly of the French bar does not extend to international arbitral tribunals sitting in France." *Id.* at 307. And New York, perhaps the leading international arbitral center in the U.S., has long recognized that the specialized nature of these proceedings takes them outside of the traditional realm of bar regulation. *See* NY Committee Report, *supra*, at 47.

C. The Bar's Proposal Recognizes That Placing Unnecessary Restrictions on a Party's Choice of Counsel Would Adversely Impact International Arbitrations in Florida

Imposing any limitation on the number of appearances an international arbitration practitioner may make in Florida in a given year, or requiring them to comply with the notice or fee provisions that are being proposed for domestic arbitrations and *pro hac vice* appearances, will significantly damage international arbitration practice in Florida.[7] The evidence submitted to the MJP Commission and the Board of Governors on this point is unequivocal. And there is ample historical proof of these facts.

The seat of arbitration is a material term to any trans-national commercial contract, and is specifically negotiated between the parties. Bond Letter, *supra*, at 2; Wilson Letter, *supra*, at 1; *see also* Rodriguez Letter, *supra*, at 2-3; COE, *supra*, at 54-55. "The objective is generally to find the most *arbitration-friendly* jurisdiction that is both neutral and convenient for each party." Bond Letter, *supra*, at 2 (emphasis added). In choosing the seat, the attorneys involved and parties to the transaction specifically consider whether the proposed jurisdiction has any restrictive regulations that might infringe on the parties freedom to choose the most qualified counsel. CRAIG, *supra*, at 308; NY Committee Report, *supra*, at 49; *see also* Bond Letter, *supra*, at 2. Indeed, the leading authorities on international arbitration expressly advise that local bar regulatory restrictions

[7] The short-term effect of imposing restrictive requirements would be two-fold. First, it would seriously damage Florida's efforts to secure the Permanent Secretariat of the FTAA. Second, it might result in a modest increase in business to Florida lawyers, who will be retained out of precaution for pending cases. This limited windfall will quickly dry up, as new contracts are negotiated and come into being, and existing ones are modified so as to avoid proceedings in Florida.

should be "considered by a party before agreeing to a place of arbitration, and militates in favor of choosing a place where the customs of international arbitration are well-known." CRAIG, *supra,* at 308-09.

In reaching its decision to propose exemptions for international arbitrations, the Bar considered undisputed evidence that the limitation on the number of appearances and the notice and fee provisions being proposed for domestic arbitrations and *pro hac vice* appearances would be considered intrusive, unnecessary restrictions and would cause the international business and legal community to steer clear of Florida. Indeed, the Bar considered the opinion of some of the world's foremost experts on international commercial arbitration. In discussing the registration requirements now being proposed only for domestic arbitrations and *pro hac vice* appearances in Court, one former Secretary General of the International Court of Arbitration of the International Chamber of Commerce (ICC), stated: "In sum, with the rest of the world to choose from, I cannot imagine why in-house or outside counsel would select Florida as the seat of an international arbitration. I certainly would not." Bond Letter, *supra,* at 2. Another expert with extensive experience negotiating arbitration clauses contained in international commercial agreements advised: "If Florida adopts the registration requirements that are being considered or any other bureaucratic requirements that diminish the convenience or efficiency in having Florida as the site of a proposed arbitration, I think most international lawyers would quickly delete Florida from their list of suggested possible alternatives." Wilson Letter, *supra,* at 1-2. In sum, the Bar received evidence that once a negative perception is created that a jurisdiction is hostile to international arbitration, that damage is done forever. That is why the Bar proposed specialized provisions and exemptions for international arbitrations - to ensure that negative perception will never be created in the first place.

History has shown that, once a jurisdiction is viewed as anti-arbitration, it is virtually impossible to recover, even if corrective measures are taken after the fact. In 1988, the High Court of Singapore extended its local legal representative's qualification requirements to international arbitration in the controversial *Turner* [8] decision. The court's opinion was read to exclude foreign lawyers from representing parties in international

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[8] In the matter of an Arbitration between Builders Federal (Hong Kong) Limited and Joseph Gartner Co., and Turner (East Asia) Pte Ltd. (No. 90 of 1987, 30 March 1988, High Court of Singapore.

arbitration in Singapore. The Court's decision, "left many international practitioners resolved not to designate Singapore as the seat of arbitration. In this way, the adverse comments generated in international circles as a result of the Turner decision had repercussions on the potential growth of Singapore as an arbitration center." CRAIG, *supra,* at 308. As a result, and to wade off further negative repercussions, the Singapore legislature eventually amended the Legal Professional Act to allow parties in international arbitration to be "represented by any person of their choice." *Id.* But the damage had already been done, and Singapore never recovered. The Singapore example has been cited repeatedly as evidence of what will happen if Florida places any unnecessary restrictions on international arbitrations. *See e.g.* Rodriguez Letter, *supra*; Bond Letter, *supra*; Wilson Letter, *supra*; Grigera Naón Letter, *supra*; *see also* CRAIG, *supra,* at 308-09; NY Committee Report, *supra,* at 49.

A second example comes from California. In 1998, the California Supreme Court of California refused to enforce a non-California attorney's attempt to enforce a fee agreement for services rendered in connection with an arbitration proceeding that was conducted in that state. The gist of the opinion was that the non-California attorneys were attempting to enforce a contract that was supported by services rendered in the unlicensed practice of law. *Birbrower, Montalbano, Condon, & Frank, P.C. et al v. Superior Court*, 17 Cal. 4th 119 (1998). While in hindsight it is unclear whether the *Birbrower* opinion actually affected international arbitrations, *Birbrower* 17 Cal. 4th at 133; Richard A. Eastman, International Decision: Birbrower, Montalbano, Condon & Frank V. Superior Court, 94 AM. J. INT'L L. 400, 403 (2000) [hereinafter Eastman], the furor it caused concerning its potential impact on such proceedings is without question.

The *Birbrower* "decision was much criticized as constituting a threat to the free and open practice of arbitration. For international practitioners, it was thought to be particularly embarrassing precedent since the United States has continuously pressed for liberalization of the delivery of legal services and has opposed restrictive local bar measures." CRAIG, *supra,* at 309. As in Singapore, California experienced a marked drop in international arbitrations seated there as a result of the negative publicity generated in international circles. Florida cannot afford a similar fiasco.

D. The Bar's Proposal Recognizes That Provisions and Exemptions Proposed for International Arbitrations Are Critical to Florida's Chances of Securing the Permanent Secretariat of the FTAA

Placing any unnecessary restrictions on international arbitrations will also significantly impact Florida's bid for the Permanent Secretariat of the FTAA. Petition, *supra*, at 27. Since 1998, Florida politicians, business leaders and other interest groups have mobilized to secure the Secretariat. *See e.g.* Mark R. Howard, *Miami's Move*, FLA. TREND, Oct. 2003, at 1 [hereinafter *Miami's Move*]. Under the terms of the FTAA, international trade disputes will be resolved in international arbitration proceedings. FTAA 3rd Draft Agreement, art. 29. The unrestricted availability of international arbitration, including the ability of lawyers from all countries that comprise the FTAA to practice international arbitration in Florida freely, is therefore a key component of Florida's bid. Rodriguez Letter, *supra*, at 2-3. Despite its natural advantage as the location for the Secretariat, however, Florida faces competition from Atlanta, as well as from Latin American, Caribbean and other U.S. cities. Rodriguez Letter, *supra*, at 2-3; *Miami's Move*, *supra*, at 2. A significant concern, therefore, is that Georgia has recommended and is in the process of adopting multijurisdictional practice rules that will promote the practice of international arbitration in that state by non-Georgia lawyers. Rodriguez

Letter, *supra*, at 2. The Florida Bar considered this evidence and is therefore recommending similar, appropriate measures for international arbitrations.

E. The Bar's Proposal Recognizes That International Arbitration Implicates United States Treaty Obligations and Federal Pre-emption Issues

The liberalization of barriers to the provision of legal services is one of the stated objectives of the World Trade Organization (WTO), the North American Free Trade Agreement (NAFTA), and the U.S. Government. When the United States became a member of the WTO, it also adhered to the General Agreement on Trade in Services ("GATS") and accepted the provisions of the GATS as binding international obligations. Lowering of barriers to trade in services, including legal services is the purpose of the GATS. *See* Laurel S. Terry, *GATS, Legal Services, and Bar Examiners: Why Should You Care?* THE BAR EXAMINER, May 2002, at 26 ("Although many lawyers and bar examiners are unaware of the fact, legal services are now covered by the World Trade Organization (WTO) trade agreements.").

The GATS requires that domestic regulation of legal services be reasonable, and that the regulation must not be more burdensome than necessary to ensure the quality of service. GATS, art. 4. It also prohibits the United States from treating or regulating services provided by a foreigner less favorably than it accords to its own like services and service providers.

GATS art. 17. State bar organizations have been informed that the ABA's "foreign lawyer recommendations are directly relevant to U.S. trade policy and likely will influence that policy." Laurel S. Terry, *The GATS, Foreign Lawyers and Two Recent Developments*, THE BAR EXAMINER, November 2002, at 23.

For their part, U.S. lawyers would like the United States to liberalize their temporary practice of law in other countries. Yet, it would seem unlikely that the U.S. Trade Representative would push for these concessions until the states began adopting the ABA or similar, tolerant standards with regard to foreign lawyers and international arbitrations. Thus, U.S. trade policy on legal services may very well be influenced by the action or inaction of U.S. states with respect to these issues. *Id.*

Equally important is the effect of international arbitration treaties entered into by the United States. The United States is party to two international commercial arbitration conventions: The Convention on The Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention") and the Inter-American Convention on International Commercial Arbitration ("the Panama Convention"). Each convention is incorporated into United States law through a separate chapter of Title 9 of the United States Code, the Federal Arbitration Act ("FAA"). 9 U.S.C. §201 *et seq*. & §304 *et seq*. Any unnecessary restrictions on international arbitration practice in Florida will conflict with the purposes of the multi-lateral instruments and, as a result, will conflict with federal law. S*ee* Grigera Naón Letter, *supra,* at 2; *see also Birbrower* Cal. 4th at 17 (Kennard, J., dissenting) (citing 9 U.S.C. § 303(b) and arguing that, pursuant to the United States' obligations under the Panama Convention, parties' unrestricted choice of counsel is required by federal law); Eastman, *supra,* at 405.

INTERNATIONAL ARBITRATION IS CRITICAL TO FLORIDA AND FLORIDA LAWYERS

A. International Arbitration Generates Business for the State and Does Not Pose Any Unreasonable Regulatory Risk to the Public

The economic benefits associated with being an international arbitral center are well documented. In London for example, international arbitration generates *several million pounds* in income per year. Bond Letter, *supra*, at 3.

Years ahead of its time, the Florida legislature cited the economic benefits of international arbitration as one of the reasons for passage of the FIAA. Task Force on International Arbitration Report, *supra*, at 4 (noting that international arbitration generates income for hotel, restaurant and entertainment industries, as well as for professionals such as lawyers, accountants, translators and other experts and consultants). New York has cited these same economic factors specifically when considering the appropriate level of local bar regulation for international arbitrations. NY Committee Report, *supra*, at 49. In 1994, the Committee on Arbitration and Alternative Dispute Resolution of the New York City Bar Association noted that "[c]ourt reporters, interpreters, translators, hotels, restaurants and other merchants will also benefit from such activity. If local counsel are required for such arbitration hearings, *as in the case in Singapore*, lawyers and foreign parties will almost *certainly steer their clients to other fora*." *Id.* (emphasis added). Concluding that international arbitrations did not warrant close regulation and that none of the major international arbitral center

imposed unnecessary restrictions on the right to counsel, the Committee unanimously affirmed the rights of parties to international arbitration proceedings to be represented by persons of their choice. *Id.* at 47-48. The Florida Bar's proposal similarly strikes the appropriate balance between protection of the public and promoting the growth of international arbitration in Florida. Petition, *supra,* at 27.

B. International Arbitration Generates Business for Florida Lawyers

It is critical to note that international arbitration also directly benefits Florida lawyers. Local lawyers are appointed as arbitrators, engaged as lead or local counsel depending on the circumstances of the case, and routinely represent parties in ancillary proceedings in state and federal courts. NY Committee Report, *supra,* at 49; Bond Letter, *supra,* at 3; Grigera Naón Letter, *supra,* at 2; Rodriguez Letter, *supra,* at 2. Ancillary court matters include, among other things, actions to compel or stay arbitration, appointment of arbitrators or the arbitral tribunal, proceedings in aid of discovery, issuance of letters rogatory and other requests for foreign assistance, requests for interim measures (preliminary injunctions), and actions to confirm or vacate awards. *See, e.g.* FIAA §§ 684.22 - 24.

Nothing in the Bar's proposal will permit out-of-state lawyers to appear in court in connection with these ancillary proceedings without

complying with all applicable *pro hac vice* requirements and, as previously indicated, does not permit foreign lawyers to appear *pro hac vice* in court at all. As such, court proceedings in connection with international arbitrations seated in Florida will continue to be handled by local lawyers. And even in those circumstances where court proceedings are properly handled by an out-of-state lawyer appearing *pro hac vice*, Florida lawyers will still be retained to provide necessary assistance regarding Florida law and procedure. *See* FLA. JUD. ADMIN RULE 2.061 (requiring that out-of-state lawyers appearing *pro hac vice* be associated with a member of the Florida Bar). As such, the Bar's proposal again strikes the appropriate balance between protection of the public and promoting the growth of international arbitration in Florida.

The many opportunities for Florida lawyers to participate in international arbitration and related ancillary court proceedings will, however, be lost unless the Court follows the Florida Bar's recommendation that no unnecessary restrictions be placed on international arbitrations. As leading authorities on international arbitration have counseled, "it is not in the long-term interest of local lawyers or local bar associations to seek to limit or exclude the appearance of foreign counsel. There is no point in having a monopoly of non-existent business." CRAIG, *supra*, at 308-09.

C. International Arbitration Will Generate Business Under the FTAA

International trade is essential to Florida's economic health. About 86% of jobs in the manufacturing sector in Florida are supported by exports. Florida Chamber Federation, *Importance of International Trade to Florida's Economy*, *available at* http://www.fccfederation.com/TradePromo2.asp (last visited June 20, 2003). In the year 2000, Florida's exports amounted to $30 billion, surpassing the export levels of many nations. *Id.* Indeed, if Florida were a country, it would place among the top 35 exporters worldwide. *Id.* In addition, pass through trade in Florida totals nearly $71 billion a year and also generates substantial business, jobs, and tax revenue. *Id.*

Securing the Permanent Secretariat of the FTAA has the potential to significantly increase these numbers. More than 89,000 direct and indirect new jobs will be created, and the State's economy will be boosted by approximately 13.5 billion dollars. *See* Rodriguez Letter, *supra*, at 1; Jane Bussey, *Trade Site Report: 89,000 More Jobs*, THE MIAMI HERALD, May 30, 2003; Florida FTAA, *Great Opportunities Await Florida as Center of Free Trade in the America's*, *available at* www.floridaftaa.org (last visited March 8, 2004). And as explained *supra*, the Bar's proposal with regard to international arbitration are designed to maximize Florida's chances in this

regard, while at the same time providing the appropriate level of public protection warranted in this context.

CONCLUSION

Based on the foregoing, the International Law Section of the Florida Bar respectfully requests that this Court adopt the proposed revisions to Rule 4-5.5 that will permit non-Florida lawyers, both U.S. and foreign, to provide temporary legal services in Florida in connection with a pending or potential arbitration, mediation or other alternative dispute resolution proceeding and in other limited contexts.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct copy of the Comments of the International Law Section of the Florida Bar was served by mail to **John F. Harkness, Jr.**, Executive Director, **Miles A. McGrane, III, Esq.**, President, **Kelly Overstreet Johnson, Esq.**, President-Elect, **Alan Bookman, Esq.**, President-Elect Designate, **Paul F. Hill**, General Counsel, **Mary Ellen Bateman, Esq.**, Director, Legal Division, Ethics, UPL, Professionalism, **Lori Holcomb, Esq.**, Director, Unlicensed Practice of Law, The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399-2300; **Charles W. Austin, Jr.**, President, Public Investors Arbitration Bar Association, 2415 A. Wilcox Drive, Norman, OK 73072 and **Stephen T. Maher, Esq.**, Shutts & Bowen LLP, Attorneys for The Florida Bar Business Law Section, 1500 Miami Center, 201 South Biscayne Boulevard, Miami, FL 33131, this 9th day of March 2004.

ELENA M. MARLOW

CERTIFICATE OF TYPE SIZE AND STYLE AND ANTI-VIRUS SCAN

I hereby certify that the foregoing Comments of the International Law Section of the Florida Bar is typed in 14 point Times New Roman Regular type and that the computer disk filed with these Comments has been scanned by Norton Anti-Virus Corporate Edition for Windows and has been found to be fee of viruses.

ELENA M. MARLOW

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